IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-878

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut

Appellant,

v.

DONNA DOE, ET AL

Appellee.

On Appeal From The United States District Court For The District of Connecticut

APPELLANT'S REPLY BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

CARL R. AJELLO
Atttorney General
30 Trinity Street
Hartford, Connecticut

MICHAEL ANTHONY ARCARI
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

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I. INSOFAR AS THE STATUTORY CLAIM IS CONCERNED, THE DECISION OF THE THREE-JUDGE DISTRICT COURT DOES NOT FALL OUTSIDE THE PURVIEW OF 28 U.S.C. ∫ 1253.

The Appellees assert that this Court does not have jurisdiction of this appeal even though a three-judge district court was convened to hear the merits of Appellees' constitutional claim. The Appellees base their assertion on the claim that "[t]he order at issue in this case could have been made by a single judge. . . . [and that a] three-judge court is not required to enjoin enforcement of a state law that conflicts with a fed-

eral statute. . . ." Appellees' Motion to Dismiss or Affirm, page 6; material in brackets supplied. The short answer to this contention is found in what this Court stated in *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975), which is as follows:

> ". . . At oral argument a question arose regarding the jurisdiction of this Court over the appeals, 28 U.S.C. § 1253, and the parties have filed supplemental briefs on this point. On authority of *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974), and *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975), appellant Weinberger contends that any appeal from the District Court's judgment should have been taken to the Court of Appeals; appellant Philbrook and appellees contend that the appeals are properly before this Court.
>
> In *Hagans* v. *Lavine*, 415 U.S. 528 (1974), this Court indicated that it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court. The District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint, App. 10, and raised their statutory contention, for the first time, at oral argument before the three-judge court. Tr. of Oral Arg. before the United States District Court for the District of Vermont 42-44 (Mar. 5, 1973). Appellant Weinberger urges us to reconsider our decision in *Engineers* v. *Chicago, R.I. & P. R. Co.*, 382 U.S. 423 (1966), in which we held that, if a three-judge court is convened and decides a case on statutory grounds, the judgment may be appealed to this Court under 28 U.S.C. § 1253, but we decline to do so." 421 U.S., at 712-713 n.8.

In this appeal, the three-judge court not only decided the merits of the statutory claim, but, once again, decided the

merits of the Appellee's constitutional claims by adhering to the conclusions reached in that Court's former opinion.[1] *Doe* v. *Maher*, 414 F.Supp. 1368, 1371, 1381, 1382 (1976). The Appellant has appealed to this Court "from an order *granting* . . ., after notice and hearing, . . . [a] permanent injunction in [a] civil action, suit or proceeding required by . . . Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253; material in italics and brackets supplied.[2] The order thus appealed from constitutes an appealable judgment to this Court under § 1253 in that such an order appealed from involved the three-judge court's resolution of the merits of the statutory claim in a civil action where constitutional claims were pleaded[3] and the merits thereof were resolved by the three-judge court. Even if the three-judge court never reached the merits of the constitutional claims after remand of this case by this Court, the merits of the statutory claim were decided by the three-judge court and the resulting order granting the injunction still constituted an appealable judgment under § 1253. *Engineers* v. *Chicago, R.I. & P. Co.*, 382 U.S. 423, 428 (1966). Furthermore, the narrow construction given § 1253 by this Court is not applicable in direct review of three-judge court orders that grant injunctions. *Gonzales* v. *Employees Credit Union*, 419 U.S. 90, 98 (1974).

Nor is this appeal inconsistent with any other rules set forth by this Court relative to jurisdiction under § 1253. The decision of the three-judge court went beyond any mere con-

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[1] After remand of this case from this Court, Appellees renewed their constitutional claims as set forth in the Appellees' complaints, intervening complaints, and oral argument. Doe v. Maher, 414 F.Supp. 1368, 1371, 1381, 1382 (1976); Tr. of oral Arg. before the United States District Court, for the District of Connecticut (on order).

[2] For more detail concerning said order appealed from, see Appellant's Jurisdictional Statement.

[3] The constitutional claims basically consisted of the constitutionality of § 52-440b of the General Statutes of Connecticut, of § 404.6 of the Connecticut Welfare Regulations, and of the defendant's actions under and enforcement of § 52-440b through the defendant's welfare regulations. Such claims of unconstitutionality were not grounded on the Supremacy Clause.

sideration of dismissing the Appellee's complaint and beyond merely dealing with issues short of the merits 'such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention' — considerations which prompted this Court's holdings in *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 802 (per curiam 1975) and in *Gonzalez* v. *Employees Credit Union*, supra at 101. Underscoring the decisions in *Baxley* and in *Gonzalez* relative to jurisdiction under § 1253 and applicable to the instant appeal is the concept that § 1253 authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits. . . . of any constitutional challenge not grounded on the Supremacy Clause or of any Supremacy Clause challenge where there is also asserted a constitutional challenge which is not grounded on the Supremacy Clause. *Gonzalez* v. *Employees Credit Union*, supra at 96 and at n.14; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965); *Engineers* v. *Chicago*, supra at 428.

As the Appellees asserted constitutional claims which were not grounded on the Supremacy Clause before and after the remand of this case, no ground existed upon which a single judge could have declined to convene a three-judge court. See *Gonzalez* v. *Employees Credit Union*, supra at 100. Because the merits of the statutory claim and the merits of the constitutional issues asserted by the Appellees were decided by the three-judge court, a justifiable ground was also lacking upon which the three-judge court could have dissolved itself. Even if the merits of Appellee's constitutional issues were not reached by the three-judge court and the three-judge court granted an injunction on the merits of the statutory claim alone, under the authority of *Engineers* v. *Chicago R.I & P.R. Co.*, supra, such an order granting the injunction would be an appealable judgment under § 1253.

Should this Court have cause to conclude for any reason that this appeal is not within the purview of § 1253, the Appellant prays that this court exercise its power by vacating the order before this Court "and remand this case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *MTM, Inc.* v. *Baxley*, supra at 804; see *Gonzalez* v. *Employees Credit Union*, supra at 101; *Mitchell* v. *Donovan*, 398 U.S. 427, 431 (1970); *Stamler* v. *Willis*, 393 U.S. 407 (1969); *Mengelkoch* v. *Welfare Comm'n.*, 393 U.S. 83, 84 (1968); *Utility Comm'n.* v. *Pennsylvania R. Co.*, 382 U.S. 281, 282 (1965); *Phillips* v. *United States*, 312 U.S. 246, 260 (1941).

II. THERE IS A SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW.

The Appellant has set forth in his Jurisdictional Statement his argument as to whether substantial questions exist warranting plenary review and the same need not be reiterated here. The argument in the Appellees' motion to dismiss or affirm dealing with this question of whether substantial questions are involved in this appeal supports the points brought out in the Appellant's Jurisdictional Statement rather than detracting from it. Indeed, the Appellees' argument only serves to emphasize that the need for plenary review of the action below is indisputable and the Appellant suggests that summary reversal of the order appealed from is now in order.

The Appellant has not abandoned the claim that the three-judge court misapplied the doctrine of comity or abstension judge court misapplied the doctrine of comity or abstention discussed in *Younger* v. *Harris*, 401 U.S. 37 (1971). The doctrine has to do with restraining equity jurisdiction and the question of whether it should have been invoked by the three-judge court is still before this Court in the instant appeal even though the Appellant has not expressly stated the issue in his jurisdictional statement. The doctrine was one of the reasons why this Court previously remanded this case to the District

Court. Since the doctrine goes to the jurisdiction of the District Court, this Court has the power, if not the duty, on its own to remand to the District Court with instructions to apply the doctrine if the District Court was in error for concluding that the doctrine was not applicable in this case.
Roe v. *Norton*, 422 U.S. 391 (1975).

CONCLUSION

For the foregoing reasons, the Appellant prays that the Appellees' motion to dismiss or affirm be denied.

Respectfully submitted,

MICHAEL ANTHONY ARCARI
Assistant Attorney General

90 Brainard Road
Hartford, Connecticut 06114
Tel. 566-7040

Counsel for the Appellant